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4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF WASHINGTON

6 PATTI J. GIDEON, )  
7 Plaintiff, ) No. CV-08-296-JPH  
8 v. ) ORDER GRANTING DEFENDANT'S  
9 MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
10 of Social Security, )  
11 Defendant. )  
12 )

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13 BEFORE THE COURT are cross-motions for summary judgment noted  
14 for hearing without oral argument on December 4, 2009. (Ct. Recs.  
15 12, 15). Attorney Clarke W. Tibbits represents plaintiff; Special  
16 Assistant United States Attorney Terrye E. Shea represents the  
17 Commissioner of Social Security ("Commissioner"). The parties  
18 have consented to proceed before a magistrate judge. (Ct. Rec.  
19 12.) After reviewing the administrative record and the briefs  
20 filed by the parties, the court **GRANTS** Defendant's Motion for  
21 Summary Judgment (Ct. Rec. 15) and **DENIES** Plaintiff's Motion for  
22 Summary Judgment (Ct. Rec. 12.)

23 **JURISDICTION**

24 Plaintiff protectively filed applications for disability  
25 insurance benefits (DIB) and supplemental security income (SSI) on  
26 May 25, 2004, alleging onset as of July 4, 2003. (Tr. 69 -  
27 protective filing date; applications not in court file.) The  
28

1 applications were denied initially and on reconsideration. (Tr.  
2 43-44, 47-50.)

3 A hearing was held April 25, 2007, before Administrative Law  
4 Judge (ALJ) Richard A. Say. Plaintiff, represented by counsel,  
5 and vocational expert Joseph A. Moisan testified. (Tr. 409-431.)  
6 On June 2, 2007, the ALJ issued his decision (Tr. 28-37) finding  
7 plaintiff not disabled as defined by the Act (Tr. 37). On July  
8 25, 2008, the Appeals Council denied review (Tr. 6-8). Therefore,  
9 the ALJ's decision became the final decision of the Commissioner,  
10 which is appealable to the district court pursuant to 42 U.S.C. §  
11 405(g). Plaintiff filed this action for judicial review pursuant  
12 to 42 U.S.C. § 405(g) on September 29, 2008 (Ct. Recs. 2,4).

#### 13 **STATEMENT OF FACTS**

14 The facts have been presented in the administrative hearing  
15 transcript, the ALJ's decision, the briefs of both parties, and  
16 are summarized here.

17 Plaintiff was 46 years old at onset and 50 at the time of the  
18 ALJ's decision. (Tr. 411-412.) She has an eighth grade education  
19 and has earned her certificate as a nursing assistant (CNA). (Tr.  
20 77, 217.) Plaintiff has worked as a certified nursing assistant,  
21 an orchard worker, server, and bartender. (Tr. 72,117,217,242.)  
22 She alleges disability onset as of July 4, 2003, due to  
23 fibromyalgia, right shoulder impairment, hypertension, chronic  
24 obstructive pulmonary disease (COPD), and anxiety. (Tr.  
25 43,47,71.)

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#### 27 **SEQUENTIAL EVALUATION PROCESS**

28 The Social Security Act (the "Act") defines "disability"

1 as the "inability to engage in any substantial gainful activity by  
2 reason of any medically determinable physical or mental impairment  
3 which can be expected to result in death or which has lasted or  
4 can be expected to last for a continuous period of not less than  
5 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
6 Act also provides that a Plaintiff shall be determined to be under  
7 a disability only if any impairments are of such severity that a  
8 plaintiff is not only unable to do previous work but cannot,  
9 considering plaintiff's age, education and work experiences,  
10 engage in any other substantial gainful work which exists in the  
11 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
12 Thus, the definition of disability consists of both medical and  
13 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
14 (9<sup>th</sup> Cir. 2001).

15 The Commissioner has established a five-step sequential  
16 evaluation process for determining whether a person is disabled.  
17 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
18 is engaged in substantial gainful activities. If so, benefits are  
19 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
20 not, the decision maker proceeds to step two, which determines  
21 whether plaintiff has a medically severe impairment or combination  
22 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
23 416.920(a)(4)(ii).

24 If plaintiff does not have a severe impairment or combination  
25 of impairments, the disability claim is denied. If the impairment  
26 is severe, the evaluation proceeds to the third step, which  
27 compares plaintiff's impairment with a number of listed  
28 impairments acknowledged by the Commissioner to be so severe as to

1 preclude substantial gainful activity. 20 C.F.R. §§  
2 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
3 App. 1. If the impairment meets or equals one of the listed  
4 impairments, plaintiff is conclusively presumed to be disabled.  
5 If the impairment is not one conclusively presumed to be  
6 disabling, the evaluation proceeds to the fourth step, which  
7 determines whether the impairment prevents plaintiff from  
8 performing work which was performed in the past. If a plaintiff  
9 is able to perform previous work, that Plaintiff is deemed not  
10 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
11 At this step, plaintiff's residual functional capacity ("RFC")  
12 assessment is considered. If plaintiff cannot perform this work,  
13 the fifth and final step in the process determines whether  
14 plaintiff is able to perform other work in the national economy in  
15 view of plaintiff's residual functional capacity, age, education  
16 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
17 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).  
18 The initial burden of proof rests upon plaintiff to establish  
19 a *prima facie* case of entitlement to disability benefits.  
20 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
21 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
22 met once plaintiff establishes that a physical or mental  
23 impairment prevents the performance of previous work. The burden  
24 then shifts, at step five, to the Commissioner to show that (1)  
25 plaintiff can perform other substantial gainful activity and (2) a  
26 "significant number of jobs exist in the national economy" which  
27 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
28 Cir. 1984).

**STANDARD OF REVIEW**

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

It is the role of the trier of fact, not this Court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the Court

1 may not substitute its judgment for that of the Commissioner.  
2 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
3 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
4 substantial evidence will still be set aside if the proper legal  
5 standards were not applied in weighing the evidence and making the  
6 decision. *Browner v. Secretary of Health and Human Services*, 839  
7 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
8 evidence to support the administrative findings, or if there is  
9 conflicting evidence that will support a finding of either  
10 disability or nondisability, the finding of the Commissioner is  
11 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
12 1987).

#### 13 **ALJ'S FINDINGS**

14 At the outset, the ALJ found plaintiff met the DIB  
15 requirements through March 31, 2008. (Tr. 28.) At step one, the  
16 ALJ found plaintiff has not engaged in substantial gainful  
17 activity since onset. (Tr. 30.) At steps two and three, the ALJ  
18 found plaintiff suffers from degenerative disc disease of the  
19 lumbar spine and right rotator cuff tear status post surgery,  
20 impairments that are severe but which do not alone or combination  
21 meet or medically equal a Listing impairment. (Tr. 30,32.) The  
22 ALJ found plaintiff less than completely credible. (Tr. 33.) At  
23 step four, relying on the VE, the ALJ found plaintiff's RFC for a  
24 range of light work prevents performing her past relevant work.  
25 (Tr. 35, relying on Tr. 425.) At step five, again relying on the  
26 vocational expert, the ALJ found there are other jobs plaintiff  
27 could perform, including telemarketer (a sedentary position),  
28 survey worker, room service clerk, and photocopying machine

1 operator. (Tr. 36, relying on Tr. 426.) Accordingly, the ALJ  
2 found that plaintiff is not disabled as defined by the Social  
3 Security Act. (Tr. 36-37.)

#### 4 **ISSUES**

5 Plaintiff contends the Commissioner erred as a matter of law  
6 by failing to properly weigh the medical evidence and erroneously  
7 assessing her credibility. She alleges these errors, in turn,  
8 resulted in a flawed RFC and incomplete questions to the VE. And,  
9 plaintiff argues the ALJ should have assessed an RFC for sedentary  
10 work making her presumptively disabled at age 50. (Ct. Rec. 15 at  
11 14.)

12 The Commissioner asks the Court to affirm the decision  
13 because, he asserts, it is supported by the evidence and free of  
14 error. (Ct. Rec. 21 at 18).

#### 15 **DISCUSSION**

##### 16 **A. Weighing medical evidence**

17 In social security proceedings, the claimant must prove the  
18 existence of a physical or mental impairment by providing medical  
19 evidence consisting of signs, symptoms, and laboratory findings;  
20 the claimant's own statement of symptoms alone will not suffice.  
21 20 C.F.R. § 416.908. The effects of all symptoms must be  
22 evaluated on the basis of a medically determinable impairment  
23 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
24 416.929. Once medical evidence of an underlying impairment has  
25 been shown, medical findings are not required to support the  
26 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d  
27 341, 345 (9<sup>th</sup> Cr. 1991).

28 A treating physician's opinion is given special weight

1 because of familiarity with the claimant and the claimant's  
2 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup>  
3 Cir. 1989). However, the treating physician's opinion is not  
4 "necessarily conclusive as to either a physical condition or the  
5 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
6 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to  
7 a treating physician than an examining physician. *Lester v.*  
8 *Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more  
9 weight is given to the opinions of treating and examining  
10 physicians than to nonexamining physicians. *Benecke v. Barnhart*,  
11 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
12 physician's opinions are not contradicted, they can be rejected  
13 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.  
14 If contradicted, the ALJ may reject an opinion if he states  
15 specific, legitimate reasons that are supported by substantial  
16 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44  
17 F. 3d 1435, 1463 (9<sup>th</sup> Cir. 1995).

18 In addition to the testimony of a nonexamining medical  
19 advisor, the ALJ must have other evidence to support a decision to  
20 reject the opinion of a treating physician, such as laboratory  
21 test results, contrary reports from examining physicians, and  
22 testimony from the claimant that was inconsistent with the  
23 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
24 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
25 Cir. 1995).

26 Opinions of Dr. Erickson and Ms. Naman

27 Plaintiff alleges the ALJ failed to properly credit the  
28 August 2003 and June 2004 opinions of treating physician Michael



1 Erickson, M.D. (Ct. Rec. 15 at 7-8.) Specifically, plaintiff  
2 alleges the ALJ should have credited Dr. Erickson's opinion  
3 plaintiff's COPD and asthma made her "severely limited" and  
4 "later, only capable of sedentary work," instead of assessing an  
5 RFC for a range of light work. (Id.)

6 To the extent the ALJ rejected Dr. Erickson's opinion, his  
7 reasons are legitimate, specific, and supported by substantial  
8 evidence in the record. See *Lester v. Chater*, 81 F. 3d 821, 830-  
9 831 (9<sup>th</sup> Cir. 1995)(holding that the ALJ must make findings  
10 setting forth specific, legitimate reasons for rejecting the  
11 treating physician's contradicted opinion). ALJ Say found Dr.  
12 Erickson's June 10, 2004, opinion (1) was given in a secondary  
13 gain context [for DSHS benefits]; (2) uses a definition of  
14 "marked" impairment that differs from that used by the Social  
15 Security Administration; (3) contains very little explanation as  
16 to how he arrived at his conclusions; (4) is entered on a checkbox  
17 form, and (5) is contradicted by another doctor's examination  
18 results. (Tr. 34-35, referring to Tr. 278-279.)

19 The ALJ correctly notes Gary Oppenheim, M.D., examined  
20 plaintiff in March of 2004 for complaints of chest pain and  
21 shortness of breath. (Tr. 34, referring to Tr. 133-134.) After  
22 testing, Dr. Oppenheim opined plaintiff's shortness of breath is  
23 likely related to COPD/asthma and she needed to quit smoking. (Tr.  
24 134).

25 The ALJ relies on the January of 2005 opinion of Richard  
26 Lynn, M.D., that spirometry testing was normal and yielded "no  
27 evidence of restriction to airflow or restrictive disease," only a  
28 mild increase in some chemicals due to smoking. (Tr. 34, referring

1 to Tr. 213). The ALJ notes plaintiff told Dr. Lynn she can walk  
2 for 10 minutes, stand for 30, sit for 2 hours, and lift 10 pounds,  
3 including overhead. (Id.)

4 Although Dr. Erickson opined in June of 2004 plaintiff's  
5 asthma is a severe impairment (as defined by DSHS), when queried  
6 in the same form whether the condition was caused by substance  
7 abuse, he checked yes, adding "tobacco smoking is central to her  
8 asthma;" and, asthma "would dissipate with 60 days of abstinence"  
9 (Tr. 278). Dr. Erickson stated plaintiff was not currently  
10 participating in treatment because "[s]he is smoking" (Tr. 279).  
11 He opined she would be capable of release for sedentary work in 12  
12 weeks, although the basis of this opinion is unclear (Tr. 279).

13 To the extent the ALJ rejected Dr. Erickson's June 2004  
14 opinion, his reasons are specific and legitimate. See e.g.,  
15 *Crane v. Shalala*, 76 F.3d 251, 253 (9<sup>th</sup> Cir. 1996)(opinions in  
16 check-box form or reports without significant explanation for the  
17 basis of the conclusions may properly be accorded little or no  
18 weight); and *Batson v. Social Security Administration*, 359 F.3d  
19 1190 (9<sup>th</sup> Cir. 2004) (contradictory examination results by another  
20 physician is a specific and legitimate reason to discount a  
21 treating physician's opinion).

22 With respect to the December 2004 and May 2007 opinions of  
23 Laurel Naman, ARNP, (Tr. 287-288,362-363) plaintiff acknowledges  
24 the ALJ was required to give reasons germane to Ms. Naman for  
25 rejecting her lay witness opinion (Ct. Rec. 15 at 1,8-9).  
26 Plaintiff is correct. The ALJ must take into account lay witness  
27 testimony, unless he or she "expressly determines to disregard  
28 such testimony and gives reasons germane to each witness for doing

1 so." *Lewis v. Apfel*, 236 F.3d 503, 511 (9<sup>th</sup> Cir. 2001). An ALJ  
2 may reject lay testimony which conflicts with medical evidence.  
3 *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9<sup>th</sup> Cir. 2005).

4 Ms. Naman checked boxes on DSHS forms indicating plaintiff  
5 was either severely limited or capable of sedentary work. The ALJ  
6 rejected her opinions for the same reasons as Dr. Erickson's (Tr.  
7 34-35). The ALJ's reasons are germane. He properly weighed the  
8 lay witness testimony.

9 To further aid in weighing the conflicting medical evidence,  
10 the ALJ evaluated plaintiff's credibility and found her less than  
11 fully credible (Tr. 34). Credibility determinations bear on  
12 evaluations of medical evidence when an ALJ is presented with  
13 conflicting medical opinions or inconsistency between a claimant's  
14 subjective complaints and diagnosed condition. *See Webb v.*  
15 *Barnhart*, 433 F. 3d 683, 688 (9<sup>th</sup> Cir. 2005).

16 It is the province of the ALJ to make credibility  
17 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9<sup>th</sup> Cir.  
18 1995). However, the ALJ's findings must be supported by specific  
19 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9<sup>th</sup> Cir.  
20 1990). Once the claimant produces medical evidence of an  
21 underlying medical impairment, the ALJ may not discredit testimony  
22 as to the severity of an impairment because it is unsupported by  
23 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9<sup>th</sup> Cir.  
24 1998). Absent affirmative evidence of malingering, the ALJ's  
25 reasons for rejecting the claimant's testimony must be "clear and  
26 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9<sup>th</sup> Cir. 1995).  
27 "General findings are insufficient: rather the ALJ must identify  
28 what testimony not credible and what evidence undermines the

1 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*  
2 *Shalala*, 12 F. 3d 915, 918 (9<sup>th</sup> Cir. 1993).

3 The ALJ gave clear and convincing reasons for his credibility  
4 assessment, some of which include failing to follow recommended  
5 courses of treatment, statements inconsistent with objective  
6 medical evidence, and inconsistent statements to providers. (Tr.  
7 34.) Each is fully supported.

8 As the ALJ observes, plaintiff failed to follow recommended  
9 courses of treatment, including smoking cessation. (Tr. 31: Ms.  
10 Naman "repeatedly noted that the claimant continued to smoke even  
11 though cessation had been strongly recommended"); (ALJ Say at Tr.  
12 34: "[plaintiff] claims to be limited by her shortness of breath,  
13 yet she voluntarily continues to smoke.") Noncompliance with  
14 medical care casts doubt on a claimant's subjective complaints.  
15 *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir. 2002); *Fair v.*  
16 *Bowen*, 885 F.2d 597,603 (9<sup>th</sup> Cir. 1989); Soc. Sec. Ruling 96-7p.

17 The ALJ notes plaintiff's testimony she can only sit 10-15  
18 minutes is undercut by her statement to John Gilbert, Ph.D., in  
19 2005, she watched television daily for two and a half hours. It  
20 is also contradicted by her own testimony she can drive for 30  
21 minutes. (Tr. 34, referring to Tr. 218, 416, 418.) Plaintiff  
22 self-reports a diagnosis of fibromyalgia, yet the only objective  
23 evidence is a note dated May 22, 2000, indicating a  
24 "rheumatologist noted that fibromyalgia tender points were  
25 positive in 2 of 18 locations<sup>1</sup>" (Tr. 317)(review of records by  
26

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27 <sup>1</sup>Fibromyalgia is diagnosed if a person feels tenderness at 11  
28 or more of the 18 designated tender points or if they have some  
tender points plus other typical symptoms. MERCK ONLINE MANUAL,  
Fibromyalgia Diagnosis at page 1.  
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1 Objective Medical Assessments Corporation on 2/9/07). More than a  
2 year after the ALJ's adverse decision, plaintiff told Ms. Naman  
3 "no specialist wanted to see her to diagnose fibromyalgia, as she  
4 [plaintiff] had requested several months ago" (Tr. 353,  
5 4/15/2008). And plaintiff's credibility as to the degree of her  
6 impairment is undermined, as the ALJ points out, by Dr. Erickson  
7 and Ms. Naman opining plaintiff can perform sedentary work.

8 The ALJ's reasons for finding plaintiff less than fully  
9 credible are clear, convincing, and fully supported by the record.  
10 See *Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9<sup>th</sup> Cir.  
11 2002)(proper factors include inconsistencies in plaintiff's  
12 statements, inconsistencies between statements and conduct, and  
13 extent of daily activities). Noncompliance with medical care or  
14 unexplained or inadequately explained reasons for failing to seek  
15 medical treatment also cast doubt on a claimant's subjective  
16 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.  
17 2d 597, 603 (9<sup>th</sup> Cir. 1989).

18 The ALJ is responsible for reviewing the evidence and  
19 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
20 *Bowen*, 881 F. 2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
21 trier of fact, not this court, to resolve conflicts in evidence.  
22 *Richardson*, 402 U.S. at 400. The court has a limited role in  
23 determining whether the ALJ's decision is supported by substantial  
24 evidence and may not substitute its own judgment for that of the  
25 ALJ, even if it might justifiably have reached a different result  
26 upon de novo review. 42 U.S.C. § 405 (g).

27 The ALJ's assessment of credibility and of Dr. Erickson's and  
28 Ms. Naman's opinions is without error and fully supported by the

1 evidence.

2 Psychological impairment

3 Plaintiff alleges the ALJ improperly rejected the opinions of  
4 consulting psychologists Mary Gentile, Ph.D., and Ed Beaty, Ph.D.  
5 (Tr. 250-266), in favor of the opinion of examining psychologist  
6 John Gilbert, Ph.D., who assessed a GAF of 65 indicating mild  
7 impairment (Tr. 219). (Ct. Rec. 15 at 10). As the opinion of an  
8 examining psychologist is always entitled to more weight than that  
9 of a reviewing (agency consulting) psychologist, the ALJ did not  
10 err. See e.g., *Benecke v. Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup> Cir.  
11 2004). In addition, Dr. Gentile opines plaintiff's attention,  
12 concentration, persistence, and pace are "slowed by physical  
13 symptoms," resulting in moderate limitation (Tr. 264, 266). The  
14 ALJ's finding that plaintiff's physical symptoms do not preclude a  
15 range of light work contradicts Dr. Gentile's assessment.

16 **B. VE**

17 Last, plaintiff contends the ALJ failed to include all of  
18 her limitations in his hypothetical to the VE (Ct. Rec. 15 at 13-  
19 14). Because the ALJ included all limitations supported by the  
20 evidence, as discussed, he did not commit error. *Bayliss v.*  
21 *Barnhart*, 427 F.3d 1211, 1217 (9<sup>th</sup> Cir. 2005)

22 **CONCLUSION**

23 Having reviewed the record and the ALJ's conclusions, this  
24 Court finds the ALJ's decision is free of legal error and  
25 supported by substantial evidence..

26 **IT IS ORDERED:**

27 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is  
28 **GRANTED.**

1        2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is  
2 **DENIED.**

3        The District Court Executive is directed to file this Order,  
4 provide copies to counsel for Plaintiff and Defendant, enter  
5 judgment in favor of Defendant, and **CLOSE** this file.

6        DATED this 12th day of January, 2010.

7                                s/ James P. Hutton  
8                                JAMES P. HUTTON  
                                 UNITED STATES MAGISTRATE JUDGE